

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JUST FILM, INC., et al.,

Plaintiffs,

v.

MERCHANT SERVICES, INC., et al.,

Defendants.

No. C 10-1993 CW

ORDER ON DEFENDANTS'
MOTIONS TO DISMISS
(Docket Nos. 108,
109, 112, 114, 115,
121 and 122)

UNIVERSAL CARD, INC. and NATIONAL
PAYMENT PROCESSING, INC.,

Cross-claimants,

v.

PROTÉGÉ INVESTMENTS, INC.; ROVER
ENTERPRISES, INC.; MERCHANT SERVICES
F.A., INC.; FIONA WALSHE; and ANTHONY
KUTSCHER, JR.,

Cross-Defendants.

ATLAS PAYMENT PROCESSING and FIONA
WALSHE,

Cross-claimants,

v.

MERCHANT SERVICES, INC.; UNIVERSAL
CARD, INC.; NATIONAL PAYMENT
PROCESSING, INC.; and JASON MOORE,

Cross-Defendants.

Plaintiffs Just Film, Inc., et al., allege that they were
defrauded in a scheme involving credit card processing services and
equipment. Defendants Merchant Services, Inc., et al., are twenty-

1 one entities and fifteen individuals that are alleged to have been
2 involved in or benefitted from the alleged fraud. Seven groups of
3 Defendants have moved to dismiss Plaintiffs' claims: (1) Defendants
4 Merchant Services, Inc.; Universal Card, Inc.; National Payment
5 Processing, Inc.; Jason Moore; Eric Madura; Nathan Jurczyk; Robert
6 Parisi; Alicyn Roy; JMW Holdings, LLC; La Quinta Holdings, LLC; and
7 Universal Merchant Services, LLC (collectively, MSI Defendants);
8 (2) Defendants MBF Leasing LLC; Northern Funding, LLC; Northern
9 Leasing Systems, Inc.; Golden Eagle Leasing LLC; Lease Finance
10 Group, LLC; RBL Capital Group, LLC; Jay Cohen; Sarah Krieger; Rich
11 Hahn; Brian Fitzgerald; Sam Buono; Lina Kravic and Leonard Mezei
12 (collectively, Northern Leasing Defendants); (3) Defendant Brian
13 Fitzgerald; (4) Defendants MBF Merchant Capital, LLC, and William
14 Healy; (5) Defendants Joseph Sussman and Joseph I. Sussman, PC
15 (collectively, Sussman); (6) Defendants TransFirst Holdings, Inc.;
16 TransFirst, LLC; TransFirst Third Party Sales, LLC; and Columbus
17 Bank and Trust Company (collectively, TransFirst and CB&T); and
18 (7) Defendant Fifth Third Bank. Defendant Fiona Walshe and
19 Defendant Lease Source-LSI, LLC, apparently erroneously sued as
20 Lease Source, LLC,¹ did not file their own motions to dismiss, but
21 instead join those above. Plaintiffs oppose the motions. A
22 hearing on the motions was held on September 16, 2010, at which the
23 Court identified deficiencies in Plaintiffs' amended complaint and
24 instructed the parties to file a status report within sixty days of
25 the date of the hearing. The parties timely filed their status

26
27 ¹ Plaintiffs' complaint names Lease Source, LLC as a
28 Defendant. However, Lease Source-LSI, LLC, has appeared in the
action, contesting Plaintiffs' allegations. It is not clear
whether the two entities are the same.

1 report.

2 Having considered oral argument and the papers submitted by
3 the parties, the Court GRANTS in part and DENIES in part the MSI
4 Defendants' Motion to Dismiss; GRANTS the Northern Leasing
5 Defendants' Motion to Dismiss; GRANTS Defendant Fitzgerald's Motion
6 to Dismiss; GRANTS MBF Merchant Capital LLC and Healy's Motion to
7 Dismiss; GRANTS Sussman's Motion to Dismiss; GRANTS in part and
8 DEFERS its decision in part on the TransFirst Defendants' Motion to
9 Dismiss; and GRANTS Fifth Third Bank's Motion to Dismiss.

10 BACKGROUND

11 Plaintiffs are California businesses and their owners, who are
12 California residents. Just Film is owned by Volker Von Glasenapp.
13 Rainbow Business Services d/b/a Precision Tune Auto Care is owned
14 by Jerry Su. Burlingame Motors is owned by Verena Baumgartner.
15 Dietz Towing, Inc., is owned by Terry Jordan. The Rose Dress Inc.
16 is owned by Lewis Bae. Below, for brevity, the Court uses each
17 respective owner's last name to refer to both the business and its
18 owner.

19 Plaintiffs divide the thirty-five Defendants into three
20 separate categories: (1) Merchant Services Defendants, (2) Leasing
21 Defendants and (3) Processor Defendants. Each category played a
22 different role in the alleged fraudulent scheme. Unless otherwise
23 noted, all parties named below are Defendants.

24 The Merchant Services category consists of California-based
25 entities and individuals. Plaintiffs allege that Merchant
26 Services, Inc. (MSI) also operates under the names Universal Card,
27 Inc.; National Payment Processing; and Universal Merchant Services
28 LLC. Plaintiffs refer to all of these entities as the Merchant

1 Services Companies and aver that each of them is the alter ego of
2 the others. Plaintiffs allege as follows about the individual
3 Merchant Services Defendants: Moore is MSI's CEO and majority
4 shareholder; Jurczyk is MSI's Vice President of Operations and an
5 MSI shareholder; Parisi is MSI's Senior Vice President and an MSI
6 shareholder; Madura is MSI's Manager of Corporate Operations;
7 Walshe was a regional sales manager for MSI; and Roy was a senior
8 account executive for MSI. Plaintiffs contend that the Merchant
9 Services Companies are alter egos of Moore, Jurczyk and Parisi.

10 Although Plaintiffs include in the Merchant Services category
11 JMW Holdings, LLC, and La Quinta Holdings, LLC, these entities were
12 not involved directly in the alleged fraud. Instead, Plaintiffs
13 allege that these are alter egos of Moore to which Moore
14 transferred various properties purchased with profits from the
15 fraudulent scheme. Plaintiffs refer to JMW Holdings and La Quinta
16 Holdings as the Moore Shell Companies. Because the Moore Shell
17 Companies were not directly involved in the alleged fraud, any
18 reference below to the Merchant Services Defendants does not
19 include them.

20 The Leasing Defendants category consists of entities and
21 individuals based outside of California. Plaintiffs allege that
22 Northern Leasing Systems Inc. has a principal place of business in
23 New York and owns MBF Leasing LLC; Golden Eagle Leasing LLC; Lease
24 Source, Inc.; Lease Finance Group, LLC; and Forrester UK Holdings
25 LLC. Plaintiffs refer to all of these entities as the Northern
26 Leasing Companies and contend that each of them is the alter ego of
27 the others. Plaintiffs allege that the following individual
28 Leasing Defendants are associated directly with the Northern

1 Leasing Companies: Cohen is Northern Leasing's President and CEO
2 and Forrester UK Holdings's President; Mezei is Northern Leasing's
3 chairman of the board; Krieger is Northern Leasing's Vice President
4 of Operations; Hahn is Northern Leasing's Vice President for Sales;
5 Fitzgerald is MBF Leasing's Executive Vice President for Business
6 Development; Kravic is MBF Leasing's Operations Manager; and Buono
7 is MBF Leasing's Vice President of Collections and Customer
8 Service. Plaintiffs aver that Sussman is a New York-based attorney
9 and is the principal of Joseph I. Sussman, P.C., a law firm. MBF
10 Merchant Capital has a principal place of business in Illinois, and
11 RBL Capital Group, LLC, has a principal place of business in New
12 York. Plaintiffs allege that Healy is MBF Merchant Capital's
13 president and sole shareholder and RBL Capital Group's former
14 president.

15 The Processor Defendants category consists entirely of
16 entities. Plaintiffs aver that TransFirst Holdings, Inc., is the
17 parent company of TransFirst LLC and TransFirst Third Party Sales,
18 Inc. Plaintiffs allege that TransFirst Holdings is headquartered
19 in Texas and that the TransFirst subsidiaries operate in Colorado.
20 Also included in this category are CB&T and First Third Bank, to
21 which Plaintiffs refer as the Bank Defendants. The Bank Defendants
22 are not California citizens.

23 The alleged fraudulent scheme operated as follows. The
24 Merchant Services Companies marketed credit card processing
25 services and equipment. Through their agents, such as Walshe, the
26 Merchant Services Companies misled Plaintiffs about the rates for
27 the services and the necessity and value of the equipment. In
28 reliance on the alleged misrepresentations, Plaintiffs entered into

1 two agreements: a Merchant Card Processing Agreement (MCPA) and an
2 Equipment Finance Lease (EFL). The MCPA governed credit card
3 transaction services, and the EFLs governed the equipment leases.
4 Von Glasenapp's, Su's, Baumgartner's and Jordan's MCPAs were with
5 TransFirst and CB&T; Bae's MCPA was with Fifth Third.² Plaintiffs
6 allege that, along with the Leasing Defendants, the Merchant
7 Services Defendants altered the terms of the MCPAs and EFLs by
8 adding pages that had not been previously presented to Plaintiffs,
9 changing material terms of the contracts and completing fields that
10 were blank at the time of execution. With regard to the added
11 pages, Plaintiffs maintain that they never saw them. Plaintiffs
12 allege that any initials or signatures indicating that they
13 reviewed the pages were forged.

14 The Leasing Defendants financed the EFLs. Specifically, MBF
15 Merchant Capital and RBL Capital Group provided the Northern
16 Leasing Companies with the funds necessary to finance the leases.
17 Krieger executed the EFLs on behalf of the Northern Leasing
18 Companies. To collect from lessees who defaulted on their
19 payments, Buono and Sussman filed collection lawsuits in New York,
20 intending to "obtain default judgments which can be sold to
21 collection agencies and also to extort payment from Class members

22
23 ² Although courts generally cannot consider documentary
24 evidence on a motion to dismiss, doing so is appropriate when the
25 pleadings refer to the documents, their authenticity is not in
26 question and there are no disputes over their relevance. Coto
27 Settlement v. Eisenberg, 593 F.3d 1031, 1038 (9th Cir. 2010);
28 Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir. 1994) (holding that
courts may properly consider documents "whose contents are alleged
in a complaint and whose authenticity no party questions, but which
are not physically attached to the [plaintiff's] pleadings").
Although Plaintiffs dispute the authenticity of portions of the
MCPAs, they do not challenge the sections that name these
Defendants as parties to the agreements.

1 who wish to preserve their good credit ratings." Am. Compl. ¶ 137.
2 In addition to working with the Merchant Services Defendants to
3 make fraudulent alterations to the terms of the EFLs, the Leasing
4 Defendants engaged in other fraudulent activities, including
5 charging Plaintiffs for a "personal property tax," even though no
6 such tax was owed to a governmental entity. Id. ¶ 124.

7 The Processor Defendants provided credit card transaction
8 services. Specifically, TransFirst, which had contracts with the
9 Merchant Services Defendants, offered "credit card acceptance and
10 processing services on behalf of" the Bank Defendants. Am. Compl.
11 ¶ 45. The Bank Defendants authorized "the Merchant Services
12 Defendants and the TransFirst Defendants to market and sell credit
13 card processing services." Id. ¶¶ 46-48. Plaintiffs allege that
14 TransFirst, along with the Merchant Services Defendants, used
15 "different bill formats to confuse customers and hide false
16 charges." Id. ¶ 128.

17 The pages allegedly added to Von Glasenapp's, Su's,
18 Baumgartner's and Jordan's MCPAs contained arbitration and forum
19 selection clauses, requiring disputes based on the agreements to be
20 arbitrated and litigated in Colorado. Bauer Decl., Exs. 1-4. The
21 pages allegedly added to Bae's MCPA designated Cincinnati or
22 Hamilton County, Ohio as the proper forum for any lawsuit arising
23 from the contract; however, his MCPA did not require arbitration.
24 Bauer Decl., Ex. 5.

25 Plaintiffs bring nine claims: (1) violation of the federal
26 Racketeer Influenced and Corrupt Organizations Act (RICO), 18
27 U.S.C. § 1962(c); (2) conspiracy to commit a RICO violation, in
28 violation of 18 U.S.C. § 1962(d); (3) "Fraud, Deceit and/or

1 Misrepresentation;" (4) negligent misrepresentation; (5) violation
2 of California's False Advertising Law, Cal. & Bus Prof. Code
3 § 17500; (6) breach of contract; (7) breach of the implied covenant
4 of good faith and fair dealing; (8) violation of California's
5 Unfair Competition Law (UCL), Cal. Bus. & Prof. Code §§ 17200, et
6 seq.; and (9) fraudulent conveyance.

7 On March 26, 2010, Plaintiffs filed their action in San
8 Francisco County Superior Court. On May 7, 2010, Defendants
9 removed the action to federal court. On June 25, 2010, Plaintiffs
10 filed an amended complaint. Plaintiffs intend to move for class
11 certification.

12 On November 23, 2010, Plaintiffs filed a notice stating that
13 they voluntarily dismissed without prejudice their claims against
14 Merrick Bank, which they had named as a Defendant in their amended
15 complaint.

16 DISCUSSION

17 I. Dismissal under Federal Rule of Civil Procedure 12(b)(2)

18 Under Rule 12(b)(2) of the Federal Rules of Civil Procedure, a
19 defendant may move to dismiss for lack of personal jurisdiction.
20 The plaintiff then bears the burden of demonstrating that the Court
21 has jurisdiction. Schwarzenegger v. Fred Martin Motor Co., 374
22 F.3d 797, 800 (9th Cir. 2004). The plaintiff "need only
23 demonstrate facts that if true would support jurisdiction over the
24 defendant." Ballard v. Savage, 65 F.3d 1495, 1498 (9th Cir. 1995).
25 Uncontroverted allegations in the complaint must be taken as true.
26 AT&T v. Compagnie Bruxelles Lambert, 94 F.3d 586, 588 (9th Cir.
27 1996). However, the court may not assume the truth of such
28 allegations if they are contradicted by affidavit. Data Disc, Inc.

1 v. Systems Technology Assocs., Inc., 557 F.2d 1280, 1284 (9th Cir.
2 1977). If the plaintiff also submits admissible evidence,
3 conflicts in the evidence must be resolved in the plaintiff's
4 favor. AT&T, 94 F.3d at 588.

5 There are two independent limitations on a court's power to
6 exercise personal jurisdiction over a non-resident defendant: the
7 applicable state personal jurisdiction rule and constitutional
8 principles of due process. Sher v. Johnson, 911 F.2d 1357, 1361
9 (9th Cir. 1990); Data Disc, Inc., 557 F.2d at 1286. California's
10 jurisdictional statute is co-extensive with federal due process
11 requirements; therefore, jurisdictional inquiries under state law
12 and federal due process standards merge into one analysis. Rano v.
13 Sipa Press, Inc., 987 F.2d 580, 587 (9th Cir. 1993).

14 The exercise of jurisdiction over a non-resident defendant
15 violates the protections created by the due process clause unless
16 the defendant has "minimum contacts" with the forum state so that
17 the exercise of jurisdiction "does not offend traditional notions
18 of fair play and substantial justice." Int'l Shoe Co. v.
19 Washington, 326 U.S. 310, 316 (1945).

20 The individual Leasing Defendants assert that the Court lacks
21 personal jurisdiction over them. Plaintiffs assert that the Court
22 may exercise jurisdiction under the RICO statute or, in the
23 alternative, specific jurisdiction. Plaintiffs do not contend that
24 general jurisdiction is proper.

25 A. RICO Jurisdiction

26 Plaintiffs maintain that 18 U.S.C. § 1965(b) supports the
27 exercise of personal jurisdiction over all individual Leasing
28 Defendants.

1 Section 1965(b) provides that, in any civil RICO action,
2 in any district court of the United States in which it is
3 shown that the ends of justice require that other parties
4 residing in any other district be brought before the
5 court, the court may cause such parties to be summoned,
and process for that purpose may be served in any
judicial district of the United States by the marshal
thereof.

6 "Congress provided for service of process upon RICO defendants
7 residing outside the federal court's district when it is shown that
8 'the ends of justice' require it." Butcher's Union v. SDV Inv.,
9 Inc., 788 F.2d 535, 539 (9th Cir. 1986) (citation omitted).
10 However, "the right to nationwide service in RICO suits is not
11 unlimited." Id. A court "must have personal jurisdiction over at
12 least one of the participants in the alleged multidistrict
13 conspiracy and the plaintiff must show that there is no other
14 district in which a court will have personal jurisdiction over all
15 of the alleged co-conspirators." Id.

16 As explained in further detail below, Plaintiffs do not allege
17 sufficient facts to support their RICO claims. Until and unless
18 they state RICO claims, the Court cannot exercise personal
19 jurisdiction under § 1965(b) over the individual Leasing
20 Defendants.

21 B. Specific Jurisdiction

22 The Court has specific jurisdiction over a defendant when the
23 cause of action arises out of or relates to the defendant's
24 activities within the forum. Data Disc, Inc., 557 F.2d at 1286.
25 The "minimum contacts" required to assert specific jurisdiction are
26 analyzed using a three-prong test: (1) the non-resident defendant
27 must purposefully direct its activities towards, or consummate some
28 transaction with, the forum or a resident thereof, or perform some

1 act by which it purposefully avails itself of the privilege of
2 conducting activities in the forum, thereby invoking the benefits
3 and protections of its laws; (2) the claim must be one which arises
4 out of or results from the defendant's forum-related activities;
5 and (3) the exercise of jurisdiction must be reasonable. Lake v.
6 Lake, 817 F.2d 1416, 1421 (9th Cir. 1987). Each of these
7 conditions is required for asserting jurisdiction. Ins. Co. of N.
8 Am. v. Marina Salina Cruz, 649 F.2d 1266, 1270 (9th Cir. 1981).

9 Plaintiffs argue that the individual Leasing Defendants
10 purposefully directed their activities toward California residents.
11 This suggests that Plaintiffs intend to bring only tort claims
12 against them; Plaintiffs do not offer a purposeful availment
13 analysis, which generally applies to contract claims. See
14 Schwarzenegger, 374 F.3d at 802 ("A purposeful availment analysis
15 is most often used in suits sounding in contract. A purposeful
16 direction analysis, on the other hand, is most often used in suits
17 sounding in tort.").

18 For a defendant's conduct to demonstrate purposeful direction,
19 the defendant must "allegedly have (1) committed an intentional
20 act, (2) expressly aimed at the forum state, (3) causing harm that
21 the defendant knows is likely to be suffered in the forum state."
22 Id. (quoting Dole Food Co., Inc. v. Watts, 303 F.3d 1104, 1111 (9th
23 Cir. 2002)).

24 Plaintiffs make only broad, general allegations against Cohen,
25 Mezei, Hahn, Fitzgerald and Kravic. Plaintiffs aver that these
26 Defendants directed and controlled the Northern Leasing Companies,
27 which is not sufficient to support personal jurisdiction. Without
28 more, the fiduciary shield doctrine applies to these Defendants.

1 Under this doctrine, "a person's mere association with a
2 corporation that causes injury in the forum state is not sufficient
3 in itself to permit that forum to assert jurisdiction over the
4 person." Davis v. Metro Prods., Inc., 885 F.2d 515, 520 (9th Cir.
5 1989). The doctrine is subject to two exceptions: "(1) where the
6 corporation is the agent or alter ego of the individual defendant;
7 or (2) by virtue of the individual's control of, and direct
8 participation in the alleged activities." Wolf Designs, Inc. v.
9 DHR & Co., 322 F. Supp. 2d 1065, 1072 (C.D. Cal. 2004) (citations
10 omitted). However, Plaintiffs do not allege facts that suggest any
11 of the Northern Leasing companies is an alter ego of any of these
12 Defendants. Nor do Plaintiffs' general allegations explain how
13 these Defendants controlled or directly participated in the alleged
14 fraudulent scheme. Thus, Plaintiffs have not justified specific
15 jurisdiction over these Defendants.

16 Although Plaintiffs plead additional facts with regard to
17 Krieger, Buono and Sussman, they are not sufficient to support
18 specific jurisdiction. Plaintiffs aver that Krieger executed Von
19 Glasenapp's EFL on behalf of the Northern Leasing Companies.
20 However, Plaintiffs do not plead facts suggesting that Krieger knew
21 or could reasonably foresee that, by executing the lease, she would
22 cause harm to Von Glasenapp. See Brayton Purcell LLP v. Recordon &
23 Recordon, 606 F.3d 1124, 1131 (9th Cir. 2010). Thus, under
24 Plaintiffs' current allegations, the Court lacks specific
25 jurisdiction over Krieger.

26 Plaintiffs allege that Buono filed lawsuits in New York to
27 collect monies due under the purportedly fraudulent contracts.
28 However, Plaintiffs do not allege that they were the subjects of

1 Buono's lawsuits. Nor do they plead that Buono took any other
2 action against any of them. Consequently, Plaintiffs' allegations
3 do not support specific jurisdiction over Buono.

4 Plaintiffs aver that Sussman served Bae with a complaint and
5 summons for a collection lawsuit filed in New York state court.
6 However, Plaintiffs do not allege facts tending to show that
7 Sussman knew of the alleged fraudulent scheme or that the filing of
8 the New York lawsuit constituted malicious prosecution or some
9 other tort. Plaintiffs offer no authority that the filing of a
10 single lawsuit, in the court of another state, is sufficient to
11 support specific jurisdiction in California. Without more, the
12 Court lacks specific jurisdiction over Sussman.

13 Finally, Plaintiffs fail to establish that specific
14 jurisdiction over Healy is appropriate. Plaintiffs allege that
15 Healy purposefully directed activities against forum residents by
16 causing MBF Merchant Capital and RBL Capital Group "to unlawfully
17 deduct monies from accounts of Plaintiffs and other Californians."
18 Am. Compl. ¶ 41. However, Healy filed an affidavit stating that
19 neither he nor MBF Merchant Capital "ever deducted payments from
20 any person's account related to" EFLs. Healy Decl. ¶ 12.
21 Plaintiffs did not address Healy's assertions in their opposition
22 or proffer an affidavit with contrary facts. Plaintiffs also
23 allege that Healy recruited the Merchant Services Defendants to
24 market credit card processing services and equipment. However,
25 Plaintiffs do not plead that Healy knew or reasonably foresaw that
26 this action would cause them harm. Consequently, Plaintiffs have
27 not justified specific jurisdiction over Healy.

28

1 C. Jurisdictional Discovery

2 Plaintiffs request leave to conduct jurisdictional discovery,
3 which the Court has discretion to grant. Boschetto v. Hansing, 539
4 F.3d 1011, 1020 (9th Cir. 2008). "Discovery may be appropriately
5 granted where pertinent facts bearing on the question of
6 jurisdiction are controverted or where a more satisfactory showing
7 of the facts is necessary." Data Disc, Inc., 557 F.2d at 1285 n.1.
8 A district court abuses its discretion only if it is evident that
9 denying discovery "results in actual and substantial prejudice to
10 the complaining litigant." Id.

11 In accordance with Defendants' proposal in the parties' status
12 report, the Court grants Plaintiffs leave to conduct jurisdictional
13 discovery. Plaintiffs may propound discovery requests on the
14 individual Leasing Defendants by December 10, 2010. These requests
15 shall be limited to discovering facts necessary to establish
16 personal jurisdiction. The individual Leasing Defendants shall
17 respond to the requests by January 20, 2011.

18 Because the Court grants Plaintiffs leave to take
19 jurisdictional discovery, the individual Leasing Defendants'
20 motions to dismiss for lack of personal jurisdiction are granted
21 and Plaintiffs are granted leave to amend their complaint to plead
22 facts to establish jurisdiction. Defendants may file their Rule
23 12(b)(2) motions anew after Plaintiffs file their second amended
24 complaint.

25 II. Dismissal under Federal Rule of Civil Procedure 12(b)(3)

26 A defendant may raise a Rule 12(b)(3) motion to dismiss for
27 improper venue in its first responsive pleading or by a separate
28 pre-answer motion. Fed. R. Civ. P. 12(b)(3). Once the defendant

1 challenges venue, the plaintiff bears the burden of establishing
2 that venue is proper. Piedmont Label Co. v. Sun Garden Packing
3 Co., 598 F.2d 491, 496 (9th Cir. 1979).

4 When considering a Rule 12(b)(3) motion to dismiss, the
5 pleadings need not be accepted as true, and the court "may consider
6 facts outside of the pleadings." Richards v. Lloyd's of London,
7 135 F.3d 1289, 1292 (9th Cir. 1998). In "the context of a Rule
8 12(b)(3) motion based upon a forum selection clause, the trial
9 court must draw all reasonable inferences in favor of the
10 non-moving party and resolve all factual conflicts in favor of the
11 non-moving party." Murphy v. Schneider Nat'l, Inc., 362 F.3d 1133,
12 1138 (9th Cir. 2004). If "the facts asserted by the non-moving
13 party are sufficient to preclude enforcement of the forum selection
14 clause, the non-moving party is entitled to remain in the forum it
15 chose for suit unless and until the district court has resolved any
16 material factual issues that are in genuine dispute." Id. at 1139.
17 "As a result, at least until facts are resolved, in many cases the
18 non-moving party will survive the Rule 12(b)(3) motion." Id.

19 Courts have discretion in resolving factual disputes related
20 to the enforcement of a forum selection clause. As the Murphy
21 court explained,

22 To resolve such motions when genuine factual issues are
23 raised, it may be appropriate for the district court to
24 hold a Rule 12(b)(3) motion in abeyance until the
25 district court holds an evidentiary hearing on the
26 disputed facts. Whether to hold a hearing on disputed
27 facts and the scope and method of the hearing is within
28 the sound discretion of the district court. . . . Upon
holding an evidentiary hearing to resolve material
disputed facts, the district court may weigh evidence,
assess credibility, and make findings of fact that are
dispositive on the Rule 12(b)(3) motion. These factual
findings, when based upon an evidentiary hearing and
findings on disputed material issues, will be entitled to

1 deference.

2 362 F.3d at 1139-40 (citations omitted).

3 TransFirst and CB&T argue that Von Glasenapp, Su, Baumgartner
4 and Jordan's claims must be dismissed for improper venue because
5 their MCPAs contain a forum selection clause designating "the
6 county and district courts in and for Boulder County, Colorado" as
7 the proper venue. See, e.g., Sullivan Decl., Ex. 2 at 20. In the
8 alternative, TransFirst and CB&T move to transfer this action to
9 the District of Colorado pursuant to 28 U.S.C. § 1406(a). As an
10 additional alternative, TransFirst and CB&T ask the Court to stay
11 this action pending arbitration, which is purportedly required
12 under these Plaintiffs' MCPAs; however, TransFirst and CB&T did not
13 move to compel arbitration. TransFirst and CB&T's motion does not
14 apply to Bae's claims because his agreement with Fifth Third Bank
15 contains a clause designating the courts of "Cincinnati or Hamilton
16 County, Ohio" as the proper venue.³ In their Consolidated Reply,
17 the other Defendants indicate they do not oppose TransFirst and
18 CB&T's transfer request.

19 Forum selection clauses are "presumptively valid" and "should
20 be honored 'absent some compelling and countervailing reason.'" Murphy,
21 362 F.3d at 1140 (quoting Bremen v. Zapata Off-Shore Co.,
22 407 U.S. 1, 12 (1972)). There are three reasons, however, that
23 "make enforcement of a forum selection clause unreasonable: (1) 'if
24 the inclusion of the clause in the agreement was the product of
25 fraud or overreaching'; (2) 'if the party wishing to repudiate the
26 clause would effectively be deprived of his day in court were the

27
28 ³ Fifth Third Bank did not move to dismiss Bae's claims under
Rule 12(b)(3).

1 clause enforced'; and (3) 'if enforcement would contravene a strong
2 public policy of the forum in which suit is brought.'" Murphy, 362
3 F.3d at 1140 (quoting Richards, 135 F.3d at 1294).

4 Von Glasenapp, Su, Baumgartner and Jordan claim that the
5 arbitration and forum selection clauses are unenforceable based on
6 their allegations that their inclusion was the product of fraud.
7 TransFirst and CB&T argue, however, that the clauses are
8 enforceable and contests these Plaintiffs' allegations that their
9 signatures and initials were forged.

10 There appears to be a dispute of material fact concerning the
11 enforceability of the arbitration and forum selection clauses in
12 Von Glasenapp's, Su's, Baumgartner's and Jordan's agreements.
13 Accordingly, the Court reserves its decision on TransFirst and
14 CB&T's motion to dismiss under Rule 12(b)(3) pending resolution of
15 this issue.

16 In accordance with Defendants' proposal in the parties' status
17 report, TransFirst, CB&T and Plaintiffs shall conduct limited
18 discovery concerning the alleged forgeries. Discovery on this
19 topic shall be propounded by December 10, 2010. Responses shall be
20 due by January 20, 2011.

21 To resolve whether the documents were forged, Plaintiffs and
22 TransFirst and CB&T shall file cross-motions for partial summary
23 judgment. Plaintiffs shall file their motion for partial summary
24 judgment on February 17, 2011. TransFirst and CB&T's cross-motion
25 for partial summary judgment and opposition to Plaintiff's motion
26 shall be due March 3, 2011. Plaintiffs' opposition to TransFirst
27 and CB&T's cross-motion and reply to TransFirst and CB&T's
28 opposition shall be due March 10, 2011. TransFirst and CB&T's

1 reply to Plaintiffs' opposition to their cross-motion shall be due
2 March 17, 2011. A hearing on the cross-motions will be held on
3 March 31, 2011 at 2:00 p.m., unless the matter is taken under
4 submission on the papers. If necessary, an evidentiary hearing
5 will be scheduled.

6 III. Dismissal under Federal Rule of Civil Procedure 12(b)(6)

7 A complaint must contain a "short and plain statement of the
8 claim showing that the pleader is entitled to relief." Fed. R.
9 Civ. P. 8(a). Dismissal under Rule 12(b)(6) for failure to state a
10 claim is appropriate only when the complaint does not give the
11 defendant fair notice of a legally cognizable claim and the grounds
12 on which it rests. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555
13 (2007). In considering whether the complaint is sufficient to
14 state a claim, the court will take all material allegations as true
15 and construe them in the light most favorable to the plaintiff. NL
16 Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).

17 However, this principle is inapplicable to legal conclusions;
18 "threadbare recitals of the elements of a cause of action,
19 supported by mere conclusory statements," are not taken as true.
20 Ashcroft v. Iqbal, ___ U.S. ___, 129 S. Ct. 1937, 1949-50 (2009)
21 (citing Twombly, 550 U.S. at 555).

22 When granting a motion to dismiss, the court is generally
23 required to grant the plaintiff leave to amend, even if no request
24 to amend the pleading was made, unless amendment would be futile.
25 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911
26 F.2d 242, 246-47 (9th Cir. 1990). In determining whether amendment
27 would be futile, the court examines whether the complaint could be
28 amended to cure the defect requiring dismissal "without

1 contradicting any of the allegations of [the] original complaint."
2 Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990).
3 Leave to amend should be liberally granted, but an amended
4 complaint cannot allege facts inconsistent with the challenged
5 pleading. Id. at 296-97.

6 A. RICO Claims

7 Plaintiffs allege claims for violations of 18 U.S.C. § 1962(c)
8 and conspiracy to violate § 1962(c). These claims are directed at
9 all Defendants, except the Moore Shell Companies.

10 "To state a claim under § 1962(c), a plaintiff must allege
11 '(1) conduct (2) of an enterprise (3) through a pattern (4) of
12 racketeering activity.'" Odom v. Microsoft Corp., 486 F.3d 541,
13 547 (9th Cir. 2007) (quoting Sedima, S.P.R.L. v. Imrex Co., 473
14 U.S. 479, 496 (1985)). Stating a § 1962(c) claim is necessary to
15 assert a claim under § 1962(d) for a RICO conspiracy; thus, the
16 failure to state the former requires dismissal of the latter. See
17 Howard v. Am. Online Inc., 208 F.3d 741, 751 (9th Cir. 2000).

18 1. RICO Enterprise

19 The Northern Leasing Defendants, TransFirst and CB&T argue
20 that Plaintiffs fail to allege the existence of a RICO enterprise.
21 Lease Source-LSI; Walshe; MBF Merchant Capital, LLC; and Healy join
22 this argument.

23 An "associated-in-fact enterprise is 'a group of persons
24 associated together for a common purpose of engaging in a course of
25 conduct.'" Odom, 486 F.3d at 552 (quoting United States v.
26 Turkette, 452 U.S. 576, 583 (1981)). To plead the existence of
27 such an enterprise, a plaintiff must allege "both evidence of an
28 ongoing organization, formal or informal, and evidence that the

1 various associates function as a continuing unit." Odom, 486 F.3d
2 at 552 (citation and internal quotation marks omitted).

3 Plaintiffs allege sufficient facts to meet their pleading
4 burden. According to their complaint, Defendants associated for
5 the common purpose of "executing a scheme to defraud class members
6 through a pattern of racketeering consisting of distinct acts of
7 mail fraud, wire fraud, and money laundering." Am. Compl. ¶ 311.
8 Further, they allege facts that, if proven, would establish that
9 Defendants participated in an ongoing organization. Finally,
10 Plaintiffs plead that Defendants' activities took place over
11 several years, which is sufficient to satisfy the continuity
12 requirement.

13 Accordingly, Plaintiffs plead the existence of a RICO
14 enterprise.

15 2. "Conduct" of a RICO Enterprise

16 TransFirst, CB&T and Fifth Third move to dismiss Plaintiffs'
17 § 1962(c) claim on the ground that Plaintiffs fail to allege facts
18 tending to show that they conducted a RICO enterprise. Walshe; MBF
19 Merchant Capital, LLC; and Healy join this argument.

20 To be liable under § 1962(c), one must have "participated in
21 the operation or management of the enterprise itself." Reves v.
22 Ernst & Young, 507 U.S. 170, 183 (1993). To do so, one must
23 demonstrate "some degree of direction." Id. at 179. "RICO
24 liability is not limited to those with primary responsibility for
25 the enterprise's affairs," nor is it limited to "those with a
26 formal position in the enterprise." Id. However, one must have
27 "some part in directing the enterprise's affairs." Id. (emphasis
28 in original). "Simply performing services for the enterprise does

1 not rise to the level of direction." Walter v. Drayson, 538 F.3d
2 1244, 1249 (9th Cir. 2008).

3 Plaintiffs argue that TransFirst and the Bank Defendants were
4 parties to and attempted to enforce the fraudulently-obtained
5 MCPAs, extracted previously undisclosed fees, and generated and
6 sent misleading billing statements. However, none of these
7 allegations suggest that these Defendants directed the affairs of
8 the RICO enterprise. As a result, Plaintiffs' RICO claims against
9 TransFirst and the Bank Defendants fail.

10 Plaintiffs do not address the joinder of Walshe; MBF Merchant
11 Capital, LLC; and Healy in this argument. The allegations against
12 these Defendants do not evince any direction of the enterprise.
13 Walshe was a regional sales manager who marketed the Merchant
14 Services Defendants' products. Although Plaintiffs aver generally
15 that Walshe "directed and controlled" the Merchant Services
16 Defendants, Am. Compl. ¶ 20, they also allege that she was one of
17 many "independent sales agents" contracted by these Defendants, id.
18 ¶ 76, which suggests she did not exercise the control necessary
19 under § 1962(c).⁴ Based on Plaintiffs' existing allegations, it
20 appears that Walshe only performed services on behalf of the
21 enterprise, which is insufficient. Consequently, Plaintiffs fail
22 to state RICO claims against Walshe.

23 Plaintiffs do not appear to allege that MBF Merchant Capital
24

25 ⁴ The problem with categorical pleading, as employed by
26 Plaintiffs, is exemplified by their allegations concerning Walshe.
27 They categorize Walshe as a Merchant Services Defendant, but also
28 allege that she "directed and controlled the Merchant Services
Defendants." Am. Compl. ¶¶ 19 and 20. And, they allege that the
Merchant Services Defendants contracted Walshe to serve as their
agent. Id. ¶ 76.

1 had any part in directing the enterprise's affairs. Thus,
2 Plaintiffs' RICO claims against MBF Merchant Capital must be
3 dismissed.

4 However, Plaintiffs make sufficient allegations against Healy,
5 who is alleged to be MBF Merchant Capital's president. Plaintiffs
6 aver that he, among other things, directed MBF Merchant Capital "to
7 consummate the unlawful transactions described herein with
8 Plaintiffs and other Californians, to unlawfully deduct monies from
9 accounts of Plaintiffs and other Californians, and to attempt to
10 enforce unlawful contractual provisions against Plaintiffs and
11 other Californians." Am. Compl. ¶ 41. These allegations suggest
12 that Healy exercised some part in directing the enterprise's
13 affairs.

14 Plaintiffs' RICO claims against TransFirst, the Bank
15 Defendants, Walshe and MBF Merchant Capital are dismissed with
16 leave to amend. In any amended complaint, Plaintiffs must allege
17 that all parties plead as RICO defendants demonstrated some degree
18 of direction over the purported enterprise.

19 3. Racketeering Activity

20 Plaintiffs allege that the RICO statutes were violated through
21 wire and mail fraud, which constitute predicate acts for a pattern
22 of racketeering activity. 18 U.S.C. § 1961(1).⁵ "A wire fraud
23 violation consists of (1) the formation of a scheme or artifice to
24 defraud; (2) use of the United States wires or causing a use of the
25 United States wires in furtherance of the scheme; and (3) specific

26
27 ⁵ Although Plaintiffs' complaint contains an allegation of
28 money laundering, Am. Compl. ¶ 311, they stated at the hearing that
their RICO claims are not currently based on money laundering as a
predicate act.

1 intent to deceive or defraud." Odom, 486 F.3d at 554 (internal
2 quotation marks omitted); 18 U.S.C. § 1343. The elements of mail
3 fraud differ only in that they involve the use of the United States
4 mails rather than wires. See 18 U.S.C. § 1341.

5 Federal Rule of Civil Procedure 9(b) requires that wire and
6 mail fraud be plead with particularity. See Odom, 486 F.3d at 553-
7 54. The allegations must be "specific enough to give defendants
8 notice of the particular misconduct which is alleged to constitute
9 the fraud charged so that they can defend against the charge and
10 not just deny that they have done anything wrong." Semegen v.
11 Weidner, 780 F.2d 727, 731 (9th Cir. 1985). Statements of the
12 time, place and nature of the alleged fraudulent activities are
13 sufficient, id. at 735, provided the plaintiff sets forth "what is
14 false or misleading about a statement, and why it is false." In re
15 GlenFed, Inc., Secs. Litig., 42 F.3d 1541, 1548 (9th Cir. 1994).
16 Scienter may be averred generally, simply by saying that it
17 existed. Id. at 1547; see Fed. R. Civ. Proc. 9(b) ("Malice,
18 intent, knowledge, and other condition of mind of a person may be
19 averred generally."). Based on this heightened pleading standard,
20 the only elements of wire and mail fraud "that require
21 particularized allegations are the factual circumstances of the
22 fraud itself." Odom, 486 F.3d at 554.

23 In Swartz v. KPMG LLP, the Ninth Circuit addressed the effect
24 of Rule 9(b) in cases involving allegations of a fraudulent scheme
25 perpetuated by multiple defendants. 476 F.3d 756, 764 (9th Cir.
26 2007). The court stated that

27 there is no absolute requirement that where several
28 defendants are sued in connection with an alleged
fraudulent scheme, the complaint must identify false

1 statements made by each and every defendant.
2 Participation by each conspirator in every detail in the
3 execution of the conspiracy is unnecessary to establish
4 liability, for each conspirator may be performing
5 different tasks to bring about the desired result. On
6 the other hand, Rule 9(b) does not allow a complaint to
7 merely lump multiple defendants together but requires
8 plaintiffs to differentiate their allegations when suing
9 more than one defendant and inform each defendant
10 separately of the allegations surrounding his alleged
11 participation in the fraud. In the context of a fraud
12 suit involving multiple defendants, a plaintiff must, at
13 a minimum, identify the role of each defendant in the
14 alleged fraudulent scheme.

15 Id. (citations and internal quotation and editing marks omitted;
16 emphasis in original). Based on this standard, the court held that
17 general allegations that the defendants knew that false statements
18 were made, that they acted in concert with parties that made false
19 statements or that they actively participated in a conspiracy are
20 insufficient as a matter of law. Id.

21 Plaintiffs interpret Swartz to mean that Rule 9(b) only
22 requires that they identify each defendant's role "where possible."
23 Opp'n at 28. Swartz does not contain such a qualification; the
24 case states in unequivocal language that Rule 9(b) mandates the
25 identification of each defendant's role.

26 Because Plaintiffs allege that each category of Defendants
27 made different fraudulent statements and had various roles in the
28 alleged schemes, the three categories are considered separately
29 below.

30 a. Merchant Services Defendants

31 According to the complaint, the Merchant Services Defendants
32 engaged in mail fraud by, among other things, sending Plaintiffs
33 altered versions of their contracts, which contained forged
34 signatures. They also aver that these Defendants sent the

1 purportedly fraudulent contracts to the Leasing and Processing
2 Defendants. To support their claims of wire fraud, Plaintiffs
3 allege that these Defendants emailed and faxed the fraudulent
4 contracts.

5 Parisi, Jurczyk and Madura assert that Plaintiffs' wire and
6 mail fraud allegations related to them are not plead with
7 sufficient specificity. In particular, they argue that Plaintiffs
8 fail to allege what role they played in the purported fraud.
9 Walshe joins this argument. The Merchant Services Companies, Moore
10 and Roy do not challenge the sufficiency of Plaintiffs' § 1962(c)
11 allegations related to them.

12 Although Plaintiffs allege with sufficient specificity the
13 factual circumstances of the fraud, they fail to allege the roles
14 played by Parisi, Jurczyk and Madura in the fraudulent scheme.
15 They allege that Parisi, Jurczyk and Madura "direct and control the
16 Merchant Services Defendants and worked in concert to cause the
17 Merchant Services Defendants to engage in the conduct described in
18 this complaint." Am. Compl. ¶ 20. This general allegation is not
19 sufficient. Thus, Plaintiffs' RICO claims against Parisi, Jurczyk
20 and Madura fail.

21 Plaintiffs sufficiently allege Walshe's role in the alleged
22 fraud. According to the complaint, among other tasks, Walshe
23 procured contracts on behalf of the Merchant Services Defendants
24 and, in doing so, made misrepresentations. Nevertheless, as
25 explained above, Plaintiffs' RICO claims against Walshe fail
26 because they do not allege facts to suggest she conducted the
27 enterprise.

28 Accordingly, because the allegations of wire and mail fraud

1 against them were not plead with sufficient specificity, the RICO
2 claims against Parisi, Jurczyk and Madura are dismissed with leave
3 to amend.

4 b. Leasing Defendants

5 The Northern Leasing entities; MBF Merchant Capital, LLC; and
6 the individual Leasing Defendants argue that Plaintiffs fail to
7 plead wire and mail fraud against them with particularity. Lease
8 Source-LSI joins this argument.

9 Plaintiffs allege that the "Leasing Defendants in Illinois"
10 sent letters to Von Glasenapp and Jordan, notifying them of a
11 "personal property tax" and a fee to file a personal property tax
12 return. Am. Compl. ¶¶ 193 and 265. Leasing Defendants
13 subsequently withdrew funds from Von Glasenapp's and Jordan's
14 accounts for the tax and filing fee. Plaintiffs aver that the
15 letters and the subsequent withdrawals for the purported tax were
16 fraudulent because no property tax returns were ever filed on
17 behalf of Von Glasenapp or Jordan.

18 These allegations are not sufficient to support wire and mail
19 fraud claims against the Leasing Defendants. Although they plead
20 fraudulent statements with specificity, Plaintiffs do not allege
21 the roles each of these Defendants played in the fraudulent scheme.
22 At a minimum, because they have the letters, Plaintiffs could plead
23 which entity sent the letters. They did not do so.

24 Plaintiffs also allege that the Leasing Defendants sent
25 letters seeking payment on "leases [they] knew to be forged." Am.
26 Compl. ¶ 335. However, Plaintiffs do not allege a factual basis
27 for their claim that the each of the Leasing Defendants knew of the
28 purported forgeries. Further, Plaintiffs fail to differentiate the

1 roles of each of the Leasing Defendants. Thus, this allegation is
2 not plead in accordance in Rule 9(b).

3 Accordingly, Plaintiffs' RICO claims against the Leasing
4 Defendants are dismissed with leave to amend. In any amended
5 complaint, Plaintiffs must, at a minimum, identify the roles each
6 Leasing Defendant played in perpetuating wire or mail fraud.

7 c. Processor Defendants

8 TransFirst and CB&T complain that Plaintiffs have not alleged
9 mail or wire fraud against them with sufficient specificity. In
10 its separate brief, Fifth Third echoes this objection.

11 Plaintiffs generally allege that TransFirst engaged in mail
12 fraud by sending "details of transaction processing it knew to be
13 fraudulent and in violation of" Plaintiffs' contracts. Am. Compl.
14 ¶ 341. Plaintiffs appear to claim that these details were
15 fraudulent because the fees charged for credit card transactions
16 were at "a much higher rate than what" was represented by the
17 Merchant Services Defendants. See Am. Compl. ¶ 189. This is not
18 sufficient to plead mail fraud against TransFirst. Although the
19 Merchant Services Defendants may have misrepresented the
20 transaction rates, Plaintiffs do not allege that TransFirst played
21 a role in making the falsehoods. Nor do Plaintiffs allege a
22 factual basis on which it could be inferred that TransFirst knew of
23 them or intended for them to be made. Based on Plaintiffs'
24 allegations, TransFirst cannot be held liable for mail fraud.

25 Plaintiffs also aver that TransFirst sent misleading and
26 deceptive billing statements. Although the statements disclosed
27 all the fees charged, Plaintiffs maintain that they were
28 "complicated and hid the fact that" each credit card transaction

1 incurred a fee higher than what was represented when Plaintiffs
2 entered into their agreements. Am. Compl. ¶ 189. Again, this
3 allegation is not sufficient. Plaintiffs do not allege that
4 TransFirst knew of or had any role in the failure to disclose the
5 fees at the time the agreements were executed. Further, because
6 Plaintiffs plead that TransFirst disclosed all of the fees it
7 charged on the statements, it does not appear to have engaged in
8 any independent fraud.

9 Plaintiffs do not allege any instances of mail fraud by the
10 Bank Defendants. Nor do they aver the Bank Defendants' roles in
11 the perpetration of mail fraud.

12 With regard to wire fraud, Plaintiffs allege that the Bank
13 Defendants caused credit card transactions to be processed at
14 "unreasonable transaction rates that had not been disclosed." Id.
15 ¶ 365. TransFirst is alleged to have debited, through electronic
16 transfers, various amounts from Plaintiffs' bank accounts. For
17 reasons already stated, these allegations are not sufficient.
18 Plaintiffs have not averred that any of these Defendants knew of or
19 played any role in the fraudulent conduct that led to the
20 imposition of these fees.

21 In sum, Plaintiffs fail to plead mail or wire fraud against
22 any of the Processor Defendants. Accordingly, for this additional
23 reason, the RICO claims against these Defendants are dismissed with
24 leave to amend. Plaintiffs must plead with specificity that these
25 Defendants made or had a role in the making of false statements.

26 5. RICO Conspiracy

27 The MSI Defendants and Fifth Third argue that Plaintiffs'
28 § 1962(d) claim must be dismissed because, even if Plaintiffs

1 alleged a substantive RICO violation, they do not aver facts
2 evincing an agreement to commit wire and mail fraud.

3 Section 1962(d) proscribes conspiracies to violate any of the
4 substantive provisions of RICO. To state a claim under § 1962(d),
5 plaintiffs must "allege either an agreement that is a substantive
6 violation of RICO or that the defendants agreed to commit, or
7 participated in, a violation of two predicate offenses." Howard,
8 208 F.3d at 751 (citation omitted). The conspiring defendants must
9 be alleged to "have been 'aware of the essential nature and scope
10 of the enterprise and intended to participate in it.'" Id.
11 (quoting Baumer v. Pachl, 8 F.3d 1341, 1346 (9th Cir. 1993)).

12 Plaintiffs point to three paragraphs in their amended
13 complaint in which they explain the benefits obtained by the
14 Merchant Services Defendants, Leasing Defendants and Processor
15 Defendants through associating together. However, none of these
16 allegations suggest that Defendants agreed to commit a substantive
17 violation of RICO or to commit the alleged predicate offenses. Nor
18 do Plaintiffs allege that all Defendants were aware of the nature
19 and scope of the enterprise or had intent to participate in it.

20 Accordingly, Plaintiffs' § 1962(d) claims are dismissed with
21 leave to amend.

22 6. RICO Injury

23 To have standing to bring a civil RICO claim, shareholders of
24 a corporation must allege a direct injury from the alleged
25 violation. Sparling v. Hoffman Const. Co., 864 F.2d 635, 640 (9th
26 Cir. 1988). Corporate shareholders lack standing to assert RICO
27 claims if their harm "derivative of harm to the corporation." Id.

28 The MSI and TransFirst Defendants argue that the individual

1 Plaintiffs' RICO claims must be dismissed because they did not
2 suffer direct and actual harm from the alleged racketeering
3 activity. However, Plaintiffs allege that they were personal
4 guarantors of the agreements at issue. The contracts proffered by
5 TransFirst do not indicate otherwise.

6 Accordingly, the individual Plaintiffs have standing to bring
7 their RICO claims.

8 7. RICO Statute of Limitations

9 RICO actions are subject to a four-year statute of
10 limitations. Pincay v. Andrews, 238 F.3d 1106, 1108 (9th Cir.
11 2001) (citation omitted). Under the Ninth Circuit's "separate
12 accrual rule," the limitations period can be reset by an overt act
13 with two characteristics: (1) it must be "a new and independent act
14 that is not merely a reaffirmation of a previous act;" and (2) it
15 must inflict "new and accumulating injury on the plaintiff."
16 Grimmett v. Brown, 75 F.3d 506, 513 (9th Cir. 1996) (emphasis in
17 original); see also Tanaka v. First Hawaiian Bank, 104 F. Supp. 2d
18 1243, 1246 (D. Hawaii 2000).

19 The MSI Defendants argue that Bae's RICO claims are time-
20 barred. Bae signed contracts for services in May, 2005. Thus,
21 under the statute of limitations, his RICO claims were time-barred
22 as of May, 2009. This action was initiated on March 26, 2010, and
23 Bae was not a named Plaintiff until June 25, 2010, the date the
24 amended complaint was filed.

25 Plaintiffs argue that the separate accrual rule applies to
26 Bae's claims, resetting the statute of limitations. They point to
27 "negative marks" placed on his credit report, although they do not
28 plead when these notations were made. Opp'n at 48. Plaintiffs

1 also point to the collection lawsuit Sussman filed against Bae in
2 March, 2010.

3 Plaintiffs do not address how this conduct reflects new and
4 independent acts separate from the injury Bae allegedly suffered
5 "when he signed the contract." Opp'n at 48. Instead, these acts
6 appear to arise from the contract. Furthermore, placing negative
7 information on a credit report and filing a lawsuit do not appear
8 to be predicate acts of racketeering activity that would trigger
9 application of the separate accrual rule. See Klehr v. A.O. Smith
10 Corp., 521 U.S. 179, 190 (1997) (explaining that the rule requires
11 "the commission of a separable, new predicate act within a 4-year
12 limitations period"); Tanaka, 104 F. Supp. 2d at 1246.

13 Accordingly, based on Plaintiffs' current pleading, Bae's RICO
14 claims are time-barred. In any amended complaint, Plaintiffs may
15 plead facts suggesting that Bae's RICO claims accrued within the
16 limitations period.

17 B. Common Law Fraud Claims

18 Plaintiffs allege common law claims for "Fraud, Deceit and/or
19 Misrepresentation" (hereinafter, intentional misrepresentation) and
20 negligent misrepresentation, which are subject to the heightened
21 pleading requirements of Federal Rule of Civil Procedure 9(b).
22 Although Plaintiffs bring their intentional misrepresentation
23 claims against all Defendants except the Moore Shell Companies,
24 they plead their negligent misrepresentation claims only against
25 Merchant Services Defendants. They state that this was a
26 "typographical error," and seek leave to amend to plead this claim
27 against the Leasing Defendants, TransFirst and the Bank Defendants.
28 Opp'n at 40 n.27. The Merchant Services Companies, Moore and Roy

1 do not move to dismiss the common law fraud claims alleged against
2 them.

3 To state a claim for fraud, a plaintiff must plead
4 "(a) misrepresentation; (b) knowledge of falsity (or
5 scienter); (c) intent to defraud, i.e., to induce reliance;
6 (d) justifiable reliance; and (e) resulting damage.'" In re
7 Napster, Inc. Copyright Litig., 479 F.3d 1078, 1096 (9th Cir. 2007)
8 (quoting Small v. Fritz Cos., Inc., 30 Cal. 4th 167, 173 (2003));
9 see generally Cal. Civ. Code §§ 1709-10. In relevant part, deceit
10 is defined as the "suppression of a fact, by one who is bound to
11 disclose it, or who gives information of other facts which are
12 likely to mislead for want of communication of that fact." Cal.
13 Civ. Code § 1710. The elements of negligent misrepresentation are
14 similar to those for intentional misrepresentation, except that a
15 plaintiff need not plead knowledge of falsity; instead, negligent
16 misrepresentation requires that the defendant made a representation
17 "without reasonable ground for believing it to be true." Glenn K.
18 Jackson, Inc. v. Roe, 273 F.3d 1192, 1200 n.2 (9th Cir. 2001).

19 Plaintiffs state claims for intentional and negligent
20 misrepresentation against Walshe. In particular, they allege that
21 in or about June, 2007, Walshe represented to Von Glasenapp that
22 the Merchant Services Defendants' rates were lower than those for
23 which he was subsequently charged. She also provided Von Glasenapp
24 an EFL that had many of "the fields for the cost of the equipment
25 and terms of the lease" left blank, Am. Compl. ¶ 177, which he
26 signed, apparently under a misimpression as to the nature of the
27 EFL. These allegations are sufficient.

28 Plaintiffs do not allege that Parisi, Jurczyk or Madura made

1 any misrepresentations.⁶ Instead, Plaintiffs argue that the
2 Merchant Services Companies' acts should be imputed to Parisi,
3 Jurczyk or Madura, who were officers of the entities. However, to
4 be held liable for torts of a corporation, officers must authorize,
5 direct or otherwise actively participate in the alleged tortious
6 activity. PMC, Inc. v. Kadisha, 78 Cal. App. 4th 1368, 1379-80
7 (2000). Plaintiffs have not plead any facts suggesting that
8 Parisi, Jurczyk or Madura consented to or approved of the Merchant
9 Services Companies' alleged torts. Plaintiffs also argue that the
10 Merchant Services Companies were alter egos of Parisi and Jurczyk.
11 This argument is unavailing, however, because Plaintiffs offer no
12 factual allegations to support their alter ego theory. The Court
13 need not accept as true "a legal conclusion couched as a factual
14 allegation." Iqbal, 129 S. Ct. at 1950 (citation and internal
15 quotation marks omitted). Accordingly, Plaintiffs' intentional and
16 negligent misrepresentation claims against Parisi, Jurczyk and
17 Madura are dismissed with leave to amend.

18 Plaintiffs' intentional misrepresentation claims against the
19 Leasing Defendants, TransFirst and the Bank Defendants fail for the
20 same reasons that their allegations of the RICO predicate acts of
21 wire and mail fraud fail.

22 In sum, because they were not subject to a motion to dismiss,
23 Plaintiffs' fraud claims against the Merchant Services Companies,
24 Moore and Roy may go forward. Plaintiffs also state cognizable
25

26 ⁶ Plaintiffs assert that Parisi, Jurczyk or Madura did not
27 move to dismiss their common law fraud claims. See Opp'n at 40
28 n.27. This is incorrect. These Defendants' motions to dismiss
challenge the sufficiency of Plaintiffs' fraud claims. See MSI
Defs.' Mot. at 12-15.

1 common law fraud claims against Walshe. The Court dismisses with
2 leave to amend Plaintiffs' intentional misrepresentation claims
3 against Parisi, Jurczyk, Madura, the Leasing Defendants, Transfirst
4 and the Bank Defendants. Plaintiffs' negligent misrepresentation
5 claims against Parisi, Jurczyk and Madura are likewise dismissed
6 with leave to amend.

7 C. Claims for Breach of Contract and Breach of the Implied
8 Covenant of Good Faith and Fair Dealing

9 Plaintiffs bring claims for breach of contract and the implied
10 covenant of good faith and fair dealing against the Merchant
11 Services Defendants, the Leasing Defendants, TransFirst and CB&T.
12 Plaintiffs have voluntarily dismissed such claims against Fifth
13 Third and the Moore Shell Companies.

14 To assert a cause of action for breach of contract, a
15 plaintiff must plead: (1) the existence of a contract; (2) the
16 plaintiff's performance or excuse for non-performance; (3) the
17 defendant's breach; and (4) damages to the plaintiff as a result of
18 the breach. Armstrong Petrol. Corp. v. Tri-Valley Oil & Gas Co.,
19 116 Cal. App. 4th 1375, 1391 n.6 (2004).

20 Without any citation to authority, the Northern Leasing
21 Defendants argue that, because Plaintiffs allege fraudulent conduct
22 related to the MCPAs and EFLs, their claims for breach of contract
23 and the implied covenant should be subject to Rule 9(b). The Court
24 understands Plaintiffs to allege that they were fraudulently
25 induced to enter into their contracts, in that they were led to
26 believe that the forms they signed contained all material terms of
27 the agreements, and that the contracts were later breached. While
28 the former is subject to Rule 9(b), the latter is not. Thus,

1 Plaintiffs' breach of contract claims are subject to the general
2 pleading standard set forth in Rule 8.

3 1. Existence of Contracts

4 Plaintiffs appear to allege that they entered into three
5 contracts: (1) the MCPAs, (2) the EFLs and (3) the "Rate Estimation
6 Comparison Sheet," or "Rate Sheet."

7 As noted above, Von Glasenapp's, Su's, Baumgartner's and
8 Jordan's MCPAs indicate that they contracted with TransFirst and
9 CB&T; Bae's MCPA states that he contracted with Fifth Third.
10 Plaintiffs' MCPAs do not name the Merchant Services Defendants or
11 the Leasing Defendants as parties. Plaintiffs nevertheless argue
12 that, because they plead that these Defendants were parties, their
13 allegations must be taken as true. This is incorrect. Courts
14 "need not accept as true allegations contradicting documents that
15 are referenced in the complaint." Lazy Y Ranch Ltd. v. Behrens,
16 546 F.3d 580, 588 (9th Cir. 2008). Thus, Plaintiffs' claims for
17 breach of contract against the Merchant Services Defendants and the
18 Leasing Defendants, insofar as these claims are based on the MCPAs,
19 are dismissed with leave to amend. If Plaintiffs intend to
20 maintain breach of contract claims based on the MCPAs against these
21 Defendants, they must explain how these Defendants were parties to
22 the MCPAs, notwithstanding these agreements' plain language.

23 Plaintiffs allege that the EFLs, which are not before the
24 Court, are contracts with the eighteen Leasing Defendants. Am.
25 Compl. ¶ 100. Plaintiffs, who presumably have the EFLs, must plead
26 which of the Leasing Defendants are parties to the agreements.
27 Plaintiffs do not allege that the Merchant Services Defendants or
28 the Processor Defendants are parties to the EFLs. Accordingly,

1 Plaintiffs' claims for breach of contract, insofar as these claims
2 are based on the EFLs, are dismissed with leave to amend. If
3 Plaintiffs intend to maintain breach of contract claims related to
4 the EFLs, they shall identify which Defendants were parties to
5 them.

6 Finally, Plaintiffs maintain that the Rate Sheet was a
7 contract that was breached. However, Plaintiffs do not allege that
8 any Defendant was a party to a contract contained in the Rate
9 Sheet. Nor do they allege that the Rate Sheet was incorporated
10 into any contract to which a Defendant was a party. Accordingly,
11 to the extent that Plaintiffs' claims for breach of contract are
12 based on the Rate Sheet, they are dismissed with leave to amend.
13 If Plaintiffs intend to maintain breach of contract claims related
14 to the Rate Sheet, they must plead which Defendant was a party to
15 it or, alternatively, that the Rate Sheet was incorporated into a
16 contract to which a named Defendant was a party.

17 2. Defendants' Breach

18 Plaintiffs theorize that the MCPAs and EFLs were breached in
19 three ways: (1) by "charging and collecting sums in excess" of
20 disclosed amounts, (2) by "injecting new contractual provisions"
21 and (3) by "imposing lengthy terms on the lease and contract
22 durations." Am. Compl. ¶ 411. Only the first appears to support a
23 claim for breach of contract. However, Plaintiffs do not identify
24 the challenged fees or the contractual provisions that set out the
25 agreed-upon rates. Without additional information, Plaintiffs do
26 not provide adequate notice as to how the contracts were breached.
27 Accordingly, Plaintiffs' first theory of breach does not support
28 their breach of contract claims.

1 As for Plaintiffs' second theory, they have not identified an
2 MCPA or EFL provision that would be breached based on the insertion
3 of new provisions. Indeed, they do not even allege facts to
4 suggest that TransFirst and CB&T inserted new terms into the MCPAs.
5 Further, this allegation appears to pertain to Plaintiffs' fraud
6 theories, not a breach of contract claim. Without more,
7 Plaintiffs' second theory fails to support their claims for breach
8 of contract.

9 Finally, it is not apparent how contracts could be breached by
10 the imposition of "lengthy terms." If Plaintiffs intend to allege
11 that these terms were inserted after they entered into the
12 contracts, their theory of breach based on these added terms fails
13 for reasons already stated. If they intend to allege that these
14 terms were imposed in contravention of other contractual terms,
15 they must do so explicitly. However, if these "lengthy terms"
16 existed at the time the contracts were executed, it is not apparent
17 how they could constitute a breach of contract.

18 Plaintiffs do not plead adequately how any Defendant breached
19 the respective contracts. Accordingly, Plaintiffs' breach of
20 contract claims are dismissed with leave to amend.

21 3. Breach of the Implied Covenant of Good Faith and
22 Fair Dealing

23 The existence of a contract is necessary for any claim for
24 breach of the implied covenant of good faith and fair dealing.
25 Spinks v. Equity Residential Briarwood Apartments, 171 Cal. App.
26 4th 1004, 1033 (2009) (citation and internal quotation marks
27 omitted). "The implied covenant of good faith and fair dealing is
28 limited to assuring compliance with the express terms of the

1 contract, and cannot be extended to create obligations not
2 contemplated by the contract." Pasadena Live, LLC v. City of
3 Pasadena, 114 Cal. App. 4th 1089, 1094 (2004) (emphasis in
4 original). The implied covenant "not only imposes upon each
5 contracting party the duty to refrain from doing anything which
6 would render performance of the contract impossible by any act of
7 his own, but also the duty to do everything that the contract
8 presupposes that he will do to accomplish its purpose." Id.
9 (citation and internal quotation marks omitted).

10 Because Plaintiffs have not adequately plead that they had a
11 contract with the Merchant Services Defendants and the Leasing
12 Defendants, their claims for breach of the implied covenant against
13 these Defendants are dismissed with leave to amend.

14 Plaintiffs plead that TransFirst and CB&T interfered with
15 their rights under their MCPAs by "refusing to address complaints
16 by Plaintiff[s] and the class about billing and service." Am.
17 Compl. ¶ 416. However, Plaintiffs do not point to a contractual
18 provision that governed how TransFirst and CB&T were to respond to
19 complaints or explain how these Defendants' conduct prevented any
20 party from performing obligations required by the MCPAs.

21 Plaintiffs also plead that TransFirst and CB&T violated the
22 implied covenant by "including additional pages and terms into the
23 contract" and "engaging in a pattern of threats and harassment to
24 enforce the fraudulent terms and conditions of the contracts." Am.
25 Compl. ¶ 416. It is not clear how these acts precluded compliance
26 with the express terms of the contracts. Furthermore, even if they
27 did, Plaintiffs do not allege facts that suggest TransFirst and
28 CB&T committed these acts.

1 Accordingly, Plaintiffs' claims for breach of the implied
2 covenant of good faith and fair dealing against TransFirst and CB&T
3 are dismissed with leave to amend.

4 D. False Advertising Claims

5 Plaintiffs bring a claim under section 17500 of the California
6 Business and Professions Code against the Merchant Services
7 Defendants, the Leasing Defendants and the Processor Defendants.
8 The Merchant Services Companies, Moore and Roy did not move to
9 dismiss these claims.

10 Section 17500 prohibits "any unlawful, unfair or fraudulent
11 business act or practice and unfair, deceptive, untrue or
12 misleading advertising." A false advertising claim under this
13 section may be brought "where the advertising complained of is not
14 actually false, but thought likely to mislead or deceive, or is in
15 fact false." Day v. AT&T Corp., 63 Cal. App. 4th 325, 332 (1998).
16 Section 17500 proscribes "not only those advertisements which have
17 deceived or misled because they are untrue, but also those which
18 may be accurate on some level, but will nonetheless tend to mislead
19 or deceive." Id.

20 Plaintiffs state a section 17500 claim against Walshe. As
21 already explained, Plaintiffs allege that she made
22 misrepresentations in marketing and advertising credit card
23 processing services and equipment.

24 However, Plaintiffs' section 17500 claims against Parisi,
25 Jurczyk, Madura, the Leasing Defendants and the Processor
26 Defendants fail. Plaintiffs have not plead that any of these
27 Defendants marketed or advertised services or equipment to them.
28 And, as noted above, Plaintiffs fail to provide a factual basis for

1 alter ego liability against Parisi and Jurczyk.

2 Accordingly, Plaintiffs' section 17500 claims against the
3 Merchant Services Companies, Moore, Roy and Walshe may go forward.
4 Their section 17500 claims against Parisi, Jurczyk, Madura, the
5 Leasing Defendants and the Processor Defendants fail.

6 E. Unfair Competition Claims

7 Plaintiffs plead claims under California's UCL against the
8 Merchant Services Defendants, the Leasing Defendants and the
9 Processor Defendants. The Merchant Services Companies, Moore and
10 Roy did not move to dismiss these claims.

11 The UCL prohibits any "unlawful, unfair or fraudulent business
12 act or practice." Cal. Bus. & Prof. Code § 17200. The UCL
13 incorporates other laws and treats violations of those laws as
14 unlawful business practices independently actionable under state
15 law. Chabner v. United Omaha Life Ins. Co., 225 F.3d 1042, 1048
16 (9th Cir. 2000). Violation of almost any federal, state or local
17 law may serve as the basis for a UCL claim. Saunders v. Superior
18 Court, 27 Cal. App. 4th 832, 838-39 (1994). In addition, a
19 business practice may be "unfair or fraudulent in violation of the
20 UCL even if the practice does not violate any law." Olszewski v.
21 Scripps Health, 30 Cal. 4th 798, 827 (2003).

22 Because Plaintiffs' section 17500 claims against the Merchant
23 Services Companies, Moore, Roy and Walshe are actionable, they also
24 state section 17200 claims against these Defendants. However,
25 Plaintiffs have not plead an adequate basis for their UCL claims
26 against Parisi, Jurczyk, Madura, the Leasing Defendants, TransFirst
27 or the Bank Defendants.

28 Accordingly, Plaintiffs' UCL claims against the Merchant

1 Services Companies, Moore, Roy and Walshe may go forward. Their
2 UCL claims against Parisi, Jurczyk, Madura, the Leasing Defendants,
3 TransFirst and the Bank Defendants are dismissed with leave to
4 amend.

5 F. Fraudulent Conveyance Claims

6 Plaintiffs bring fraudulent conveyance claims against Moore
7 and the Moore Shell Companies.

8 The Uniform Fraudulent Transfer Act (UTFA) "permits defrauded
9 creditors to reach property in the hands of a transferee." Mejia
10 v. Reed, 31 Cal. 4th 657, 663 (2003). Transfers can be fraudulent
11 "both as to present and future creditors." Id. at 664.

12 A transfer can be invalid if a debtor transfers with the
13 "actual intent to hinder, delay, or defraud any creditor of the
14 debtor." Cal. Civ. Code § 3439.04(a)(1). "Whether a conveyance
15 was made with fraudulent intent is a question of fact, and proof
16 often consists of inferences from the circumstances surrounding the
17 transfer." Filip v. Bucurenciu, 129 Cal. App. 4th 825, 834 (2005).
18 In determining a debtor's intent, courts may consider whether "the
19 debtor retained possession or control of the property transferred
20 after the transfer;" whether "before the transfer was made or
21 obligation was incurred, the debtor had been sued or threatened
22 with suit;" and whether "the value of the consideration received by
23 the debtor was reasonably equivalent to the value of the asset
24 transferred or the amount of the obligation incurred." Cal. Civ.
25 Code § 3439.04(b)(2), (4) and (8).

26 Plaintiffs do not plead in their complaint that Moore retained
27 control or possession of the transferred properties. Plaintiffs
28 argue that, because the Moore Shell Companies are alter egos of

1 Moore, he retained possession and control of the properties and did
2 not receive reasonably equivalent value for the transfers.
3 However, Plaintiffs do not offer an adequate factual basis to
4 support their legal conclusion that the Moore Shell Companies were
5 alter egos. Nor do they allege a factual basis for their
6 conclusion that he did not receive sufficient consideration for the
7 transfers.

8 Plaintiffs also argue that, when he initiated the transfers in
9 April, 2009, Moore had been sued or had notice of impending
10 lawsuits. However, Plaintiffs identify only one lawsuit, Navratil
11 v. Merchant Services, Inc., No. 2:09-cv-05945-DDP-SS (C.D. Cal.),
12 which was apparently filed in July, 2009. Plaintiffs do not allege
13 that Moore received notice of this suit before it was filed. The
14 filing of Navratil, on its own, does not support their fraudulent
15 conveyance claims.

16 Finally, Plaintiffs argue that Moore "was profiting from a
17 massive scheme of defrauding small business and that Moore used the
18 profits from this scheme to purchase the properties in question."
19 Opp'n at 44. This, without more, is not sufficient to show Moore's
20 fraudulent intent. Plaintiffs allege that the purported fraudulent
21 scheme had existed since at least 2005. This dissipates any
22 reasonable inference that, in April, 2009, Moore fraudulently
23 transferred properties because of his involvement in the scheme.

24 Accordingly, Plaintiffs' fraudulent conveyance claims against
25 Moore and the Moore Shell Companies are dismissed with leave to
26 amend. Plaintiffs must plead a factual basis to support their
27 assertions that Moore had fraudulent intent.

28

1 IV. Preliminary Discovery

2 Pursuant to Federal Rule of Civil Procedure 26(d)(1) and in
3 accordance with Defendants' proposal in the parties' joint status
4 report, the Court grants the parties leave to conduct discovery on
5 the following matters: (1) the alleged forgeries of Plaintiffs'
6 initials or signatures, (2) alter ego theories of liability and
7 (3) personal jurisdiction. Discovery requests shall be propounded
8 by December 10, 2010. Responses are due January 20, 2011. The
9 parties shall not take discovery on matters outside of the scope of
10 those listed above.

11 The Court notes that several of Plaintiffs' discovery
12 requests, contained in Exhibit A of the parties' status report,
13 appear overbroad, particularly in light of the issues raised by the
14 Court at the September 16 hearing. To be clear, the Court grants
15 limited preliminary discovery only to resolve issues of personal
16 jurisdiction and proper venue. Plaintiffs shall not take discovery
17 that relates solely to the merits of their case. All discovery-
18 related motions shall be referred to a magistrate judge.

19 CONCLUSION

20 For the foregoing reasons, the Court GRANTS in part and DENIES
21 in part the MSI Defendants' Motion to Dismiss (Docket No. 112);
22 GRANTS the Northern Leasing Defendants' Motion to Dismiss (Docket
23 No. 114); GRANTS Defendant Fitzgerald's Motion to Dismiss (Docket
24 No. 115); GRANTS MBF Merchant Capital LLC and Healy's Motion to
25 Dismiss (Docket No. 108); GRANTS Sussman's Motion to Dismiss
26 (Docket No. 122); GRANTS in part and DEFERS its decision in part on
27 the TransFirst Defendants' Motion to Dismiss (Docket No. 121); and
28 GRANTS Fifth Third Bank's Motion to Dismiss (Docket No. 109).

1 The Court's rulings are summarized as follows:

- 2 1. Plaintiffs have not established that the Court has
3 personal jurisdiction over the individual Leasing
4 Defendants. Plaintiffs may conduct discovery to
5 establish jurisdictional facts. Plaintiffs are granted
6 leave to amend their complaint to add facts that support
7 personal jurisdiction. The individual Leasing Defendants
8 may renew their motions to dismiss for lack of personal
9 jurisdiction after Plaintiffs file their second amended
10 complaint.
- 11 2. There is a dispute concerning the enforceability of the
12 arbitration and forum selection clauses in Von
13 Glasenapp's, Su's, Baumgartner's and Jordan's MCPAs.
14 TransFirst, CB&T and Plaintiffs may conduct discovery on
15 whether Von Glasenapp's, Su's, Baumgartner's and Jordan's
16 initials and signatures were forged. To resolve this
17 matter, TransFirst, CB&T and Plaintiffs shall then file
18 cross-motions for partial summary judgment on the alleged
19 forgeries. Plaintiffs shall file their motion on
20 February 17, 2011. TransFirst and CB&T's cross-motion
21 and opposition to Plaintiff's motion shall be due March
22 3, 2011. Plaintiffs' opposition to TransFirst and CB&T's
23 cross-motion and reply to TransFirst and CB&T's
24 opposition shall be due March 10, 2011. TransFirst and
25 CB&T's reply to Plaintiffs' opposition to their cross-
26 motion shall be due March 17, 2011. A hearing on the
27 cross-motions will be held on March 31, 2011 at 2:00 p.m.
28 if the matter is not submitted on the papers. An

evidentiary hearing will be scheduled if necessary.

3. Because they were not subject to a motion to dismiss, Plaintiffs' RICO claims under 18 U.S.C. § 1962(c) against the Merchant Services Companies, Moore and Roy are cognizable. However, their § 1962(c) claims against the other Defendants are dismissed with leave to amend to plead, among other things, that these Defendants conducted the RICO enterprise and engaged in a pattern of racketeering activity.

4. Plaintiffs' claim under 18 U.S.C. § 1962(d) for conspiracy to commit a RICO violation is dismissed with leave to amend to plead a conspiratorial agreement and each Defendants' awareness of the RICO conspiracy.

5. Bae's RICO claims are dismissed as time-barred. He is granted leave to amend to plead facts indicating that his RICO claims accrued during the limitations period.

6. Because they were not subject to a motion to dismiss, Plaintiffs' common law fraud claims against the Merchant Services Companies, Moore and Roy are cognizable. Plaintiffs have stated actionable common law fraud claims against Walshe. However, their common law fraud claims against the other Defendants are dismissed with leave to amend to plead with specificity, among other things, the actionable misrepresentations these Defendants made. In the alternative, Plaintiffs may allege an alter ego theory of liability, so long as evidence obtained through discovery supports their claim. Plaintiffs are also granted leave to amend to plead negligent

1 misrepresentation claims against Defendants other than
2 the Merchant Services Defendants, so long as they have a
3 factual basis to do so.

4 7. Plaintiffs' breach of contract claims against the
5 Merchant Services Defendants and Leasing Defendants are
6 dismissed with leave to amend to plead facts indicating
7 that these Defendants were parties to Plaintiffs'
8 contracts. Plaintiffs' breach of contract claims against
9 TransFirst and CB&T are dismissed with leave to amend to
10 plead the provisions breached by these Defendants.

11 8. Plaintiffs' claims for breach of the implied covenant of
12 good faith and fair dealing against the Merchant Services
13 Defendants and Leasing Defendants are dismissed with
14 leave to amend to plead facts that these Defendants were
15 parties to Plaintiffs' contracts. Their claims against
16 TransFirst and CB&T are dismissed to plead conduct that
17 violated the implied covenant.

18 9. Because they were not subject to a motion to dismiss,
19 Plaintiffs' section 17500 claims against the Merchant
20 Services Companies, Moore and Roy are cognizable.
21 Plaintiffs have stated cognizable section 17500 claims
22 against Walshe. Plaintiffs' section 17500 claims against
23 the other Defendants are dismissed with leave to amend to
24 plead that they made actionable statements. In the
25 alternative, Plaintiffs may allege an alter ego theory of
26 liability, so long as evidence obtained through discovery
27 supports their claim.

28 10. Because they were not subject to a motion to dismiss,

1 Plaintiffs' UCL claims against the Merchant Services
2 Companies, Moore and Roy are cognizable. Plaintiffs have
3 stated cognizable UCL claims against Walshe. Plaintiffs'
4 UCL claims against the other Defendants are dismissed
5 with leave to amend to plead actionable conduct. In the
6 alternative, Plaintiffs may allege an alter ego theory of
7 liability, so long as evidence obtained through discovery
8 supports their claim.

9 11. Plaintiffs' fraudulent conveyance claims against Moore
10 and the Moore Shell Companies are dismissed with leave to
11 amend to plead facts that suggest Moore had fraudulent
12 intent.

13 Plaintiffs' second amended complaint shall be filed fourteen
14 days after the Court issues an order on the cross-motions for
15 partial summary judgment on the alleged forgeries. Defendants
16 shall answer or move to dismiss the second amended complaint
17 fourteen days after it is filed. If Defendants intend to move to
18 dismiss Plaintiffs' second amended complaint, those represented by
19 the same counsel shall support their motion in a consolidated
20 opening brief. Plaintiffs' opposition to the motions to dismiss
21 shall be contained in a consolidated brief not to exceed forty-five
22 pages filed fourteen days thereafter. Defendants may file their
23 replies seven days after that. The motions will be decided on the
24 papers, unless the Court sets a hearing.

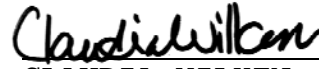
25 As noted above, claims against the Merchant Services
26 Companies, Moore, Roy and Walshe are cognizable. The Court extends
27 the time these Defendants have to answer Plaintiffs' complaint. If
28 this action is not dismissed for improper venue or transferred,

1 these Defendants' answers shall be due fourteen days after the
2 Court enters an order on any motion to dismiss the second amended
3 complaint. These Defendants may not move to dismiss claims in
4 Plaintiffs' second amended complaint that are identical to those
5 alleged in Plaintiffs' current pleading.

6 The case management conference, previously scheduled for March
7 15, 2011, is reset for March 31, 2011.

8 IT IS SO ORDERED.

9
10 Dated: 11/29/2010



CLAUDIA WILKEN
United States District Judge